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Supreme Court, U.S.
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No. 08-601

In the Supreme Court of the United States

CLEVELAND CONSTRUCTION, INC.,
Petitioner,

v.

CITY OF CINCINNATI,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

BRIEF IN OPPOSITION

JOHN P. CURP
CITY SOLICITOR
MARY FRANCES CLARK
Counsel of Record
RICHARD GANULIN
ASSISTANT CITY SOLICITORS
ROOM 214, CITY HALL
801 PLUM STREET
CINCINNATI, OH 45202
(513) 352-3328
(513) 352-1515 FAX
mary.clark@cincinnati-oh.gov

Counsel for Respondent

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

I. WHETHER THIS COURT SHOULD EXERCISE JURISDICTION WHEN THE SUPREME COURT OF OHIO, APPLYING LONG-ESTABLISHED PRINCIPLES, DENIED THE PETITIONER'S CLAIM TO A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST IN A PUBLIC CONTRACT AWARDED UNDER A DISCRETIONARY "LOWEST AND BEST BID" STANDARD.

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STATEMENT OF THE CASE

Cleveland Construction, Inc. ("Cleveland Construction"), ignoring the very broad "lowest and best bid" discretion reserved to City of Cincinnati ("City") purchasing officials throughout the Cincinnati Municipal Code and bid-specific materials (reviewed by the Supreme Court of Ohio and applied to deny Cleveland Construction's procedural due process claim), instead erroneously asserts to this Court that the basis for the "claimed violation of its constitutional procedural due process rights is that the City had *no* discretion under the City code to award to any bidder other than Cleveland if it awarded the contract on the basis of the bidders [sic] meeting the subcontracting requirement of the SBE program."[1]

In addition to basing its claim on an erroneous assertion of law and fact, Cleveland Construction weaves irrelevant equal opportunity aspects of the City's procurement system into its Petition for Writ of Certiorari. Those equal opportunity provisions that relate to the City's efforts to discourage discrimination against minority-owned and women-owned subcontractors are relevant to, and discussed in, the City's own Petition for Writ of Certiorari separately pending before this Court.[2] Those equal opportunity provisions do not, however, have any bearing on

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[1] Petition for Writ of Certiorari p. 9 (emphasis added).

[2] Case No. 08-580, presenting equal protection questions to this Court.

Cleveland Construction's procedural due process questions presented to this Court.[3]

Instead, as the Supreme Court of Ohio recognized, the City required that bidders for the Convention Center drywall contract reserve 35 percent of the project for small business subcontractors. The bidders knew that failure to satisfy the 35 percent requirement could result in rejection of a bid. By its own admission, Cleveland Construction failed to meet the 35 percent requirement and therefore was not awarded the drywall contract.[4]

REASON FOR DENYING THE PETITION

This Court Should Not Exercise Jurisdiction In A Case Where The Petitioner Cannot Establish The Existence of A Constitutionally Protected Property Interest Because The Awarding Of A Contract Under A Discretionary Public Procurement System Does Not Create A Legitimate Claim of Entitlement To That Contract.

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[3] The City required that bidders for the Convention Center drywall contract comply with race-neutral and gender-neutral *small business* subcontracting percentages. The City only requested good-faith efforts by bidders to meet the separate availability estimates for minority-owned and women-owned subcontractors. In any event, the trial court concluded that the City had not applied its equal opportunity requirements to deny Cleveland Construction the drywall contract. App. 88a. Rather, the trial court correctly concluded, and the Supreme Court of Ohio also recognized, that Cleveland Construction was denied the drywall contract because it failed to reserve 35 percent of the work for small business subcontractors. App. 86a.

[4] Petition for Writ of Certiorari p. 8.

This Court long ago established the basis for determining whether an individual or entity has a constitutionally protected property interest justifying procedural due process protections. Just as the Supreme Court of Ohio described in its decision,[5] Cleveland Construction first had to establish that it had a constitutionally protected property interest in the drywall contract before it could claim a violation of procedural due process rights. By reference to *Board of Regents of State Colleges v. Roth*,[6] the Supreme Court of Ohio accurately stated that "it is well settled that a constitutionally protected property interest exists only when a claimant has 'more than an abstract need or desire for it. [The claimant] must have more than a unilateral expectation of it. [The claimant] must, instead, have a legitimate claim of entitlement to it.'"[7] Further quoting *Town of Castle Rock, Colorado v. Gonzalez*,[8] the Supreme Court of Ohio emphasized that a "benefit is not a protected entitlement if government officials may grant or deny it in their discretion."[9]

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[5] App. 5a.

[6] 408 U.S. 564, 569-70 (1972).

[7] App. 5a (quoting *Roth*, 408 U.S. at 577). Cleveland Construction acknowledges that the *Roth* case "must be the starting point in any analysis of whether a property interest subject to due process protection under the Fourteenth Amendment has been created." Petition for Writ of Certiorari p. 17 (citing *Roth*, 408 U.S. at 577).

[8] 545 U.S. 748, 756 (2005).

[9] App. 5a.

Therefore, Cleveland Construction wildly exaggerates when it represents to this Court: "The decision of the Supreme Court of Ohio sets a dangerous precedent, and one that is at odds with the constitutional jurisprudence of this Court delineating when property interests protected by due process arise."[10] In fact, contrary to Cleveland Construction's assertion, the decision of the Supreme Court of Ohio precisely followed this Court's long-existing precedents establishing the standard for determining whether a party's interest in a public benefit is a mere expectation or is an entitlement.

The fallacy in Cleveland Construction's property interest argument is best exposed by its own concession. Cleveland Construction frames its first question presented as "[w]hether a state scheme of competitive bidding . . . *may* give rise to a property interest protected by due process."[11] Cleveland Construction acknowledges in its Petition that it only reaches its argument "*if* the City proceeded to make an award of the drywall contract under the circumstances that it did . . . ."[12] Constitutionally protected property interests are determined *ex ante*. Where the government retains broad discretion whether, and how, to even proceed, the party seeking the benefit only has, at best, an expectation of receiving that benefit. "*If* the City proceeded . . . ." means, *ex ante*, that the bidders for the Convention Center drywall work did not, as a matter of law, have a legitimate

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[10] Petition for Writ of Certiorari pp. 14-15.

[11] *Id.* at i (emphasis added).

[12] *Id.* at 17 (emphasis added).

claim of entitlement to that contract. Each bidder merely had an expectation that perhaps it might be the successful bidder. However, the City had reserved discretion whether, and how, to proceed with the contract award. Even Cleveland Construction, quoting *Town of Castle Rock v. Gonzales*, conceded: "[A] benefit is not a protected entitlement if government officials may grant or deny it in their discretion."[13]

Therefore, on the one hand, Cleveland Construction admits (just as the Supreme Court of Ohio expressed in detail) that the City's "lowest and best bid" purchasing system and the specific bid materials for the Convention Center drywall contract allowed the City to decide "if" it was even going to proceed, and further admits that if government officials retain discretion whether to proceed, an expected benefit is not a protected entitlement. On the other hand, Cleveland Construction suggests to this Court that the decision of the Supreme Court of Ohio "sets a dangerous precedent" even though that decision simply recognized the very broad "lowest and best bid" discretion reserved to City officials and drew the obvious legal conclusion.

By reference to protected *liberty* interest cases,[14] Cleveland Construction fallaciously argues that even though the City had very broad discretion under its "lowest and best bid" procurement system (including the discretion to reject any and all bids for any reason),

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[13] *Id.* at 18 (quoting *Castle Rock*, 545 U.S. at 756 (citing *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 462-63 (1989))).

[14] *Id.* at 18-20.

if City discretion was circumscribed by specific standards, and *if* Cleveland Construction had to be considered for the drywall contract notwithstanding application of the specific standards, *then* it has a constitutionally protected property interest. The fallacy in Cleveland Construction's argument is that the City's "lowest and best bid" purchasing system did *not* require that Cleveland Construction be considered, or even that any bidder be considered, for the drywall contract. In *Greenholtz v. Nebraska Penal Inmates*[15] and *Board of Pardons v. Allen*,[16] the parole release liberty cases discussed by Cleveland Construction in its Petition, the incarcerated individuals had a *right* to be reviewed for parole, albeit subject to a scheme that contained standards to be applied by officials. In contrast, the City's "lowest and best bid" purchasing system does not, *ex ante*, confer any right upon a bidder to be considered for a City contract. City officials did not have to consider any bids since they reserved the right to reject any and all bids for any reason. Cleveland Construction's analogy to the parole release liberty cases fails.

Indeed, the Supreme Court of Ohio emphasized the broad discretion in the City's procurement system:

> In awarding contracts, the city retains broad discretion to accept and reject bids generally. Cincinnati Municipal Code 321-43 states that "[t]he City purchasing agent, City manager, or any other duly authorized contracting officer

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[15] 442 U.S. 1 (1979).

[16] 482 U.S. 369 (1987).

> *may reject any bid for any reason or all bids for no reason* if acceptance of the lowest and best bid is not in the best interests of the City."[17]

The Supreme Court of Ohio added:

> In this case, the city's bid package, which contained the invitation to bid and the bidding requirements, similarly reserved the right of the city to "reject any and all bids or parts of any bid * * * and not award a contract" and to "consider all elements entering into the question of determining the responsibility of the bidder."[18]

And:

> The documents also stated that "[a]ny bid which is incomplete * * * or which contains * * * irregularities of any kind, may be cause for rejection of [the] bid." The invitation to bid also informed potential bidders that they "will be subject to the provisions of the City of Cincinnati * * * Small Business Enterprise Program. Failure of a bidder to comply with these requirements may be cause for rejection of the bid."[19]

Conclusively distinguishing the nature of the City's broad discretion in the case at bar from the type of

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[17] App. 6a.

[18] *Id.*

[19] *Id.* at 6a-7a.

discretion described in the parole release liberty cases presented by Cleveland Construction, the Supreme Court of Ohio held:

> Clearly, the Cincinnati Municipal Code and the bidding documents are united in emphasizing the city's broad discretion to grant or deny contracts. In fact, the city is not required to award a contract at all if it is dissatisfied with any of the submitted bids.[20]

Finally: "Given the extensive discretion of the city in considering bids, Cleveland Construction had no property right in the drywall contract at issue in this case."[21]

The concurring opinion in the Supreme Court of Ohio added:

> State law mandates only that public contracts of this magnitude be awarded to the "lowest and best bidder." R.C. 735.05. The Cincinnati Municipal Code also requires the city to select the "lowest and best bidder," but provides the city with broad discretion to "reject any bid for any reason." Cincinnati Municipal Code 321-37 and 321-43. In addition, the city's bid package gave the city broad discretion to reject a bid.[22]

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[20] *Id.* at 7a.

[21] *Id.* at 9a.

[22] *Id.* at 10a-11a.

Cleveland Construction further argues to this Court that since the City purchasing agent "may" consider, when determining the lowest and best bid, information concerning compliance with the City's equal opportunity and non-discrimination program and "may" make an award subject to a cost limitation, somehow this discretionary consideration transforms Cleveland Construction's bid into an entitlement. Cleveland Construction provides to this Court that "may" is defined in the City's procurement code as "permissive."[23] The Supreme Court of Ohio recognized that "'may' is always used as a permissive term" in the Cincinnati Municipal Code.[24] The Supreme Court of Ohio concluded that even assuming *arguendo* that the City violated its own code by awarding the Convention Center drywall contract to the successful bidder, this hypothetical violation did not mean that Cleveland Construction was entitled to the contract.[25] After all, Cleveland Construction was not awarded the contract because Cleveland Construction's bid did not satisfy the 35 percent small business subcontracting requirement.[26]

Cleveland Construction separately argues, for the first time in this case, that the City's alleged violation

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[23] Petition for Writ of Certiorari p. 4.

[24] App. 8a.

[25] *Id.* at 9a.

[26] The City's 35 percent small business subcontracting requirement for the Convention Center drywall work is different from the City's equal opportunity and non-discrimination program.

of its equal protection rights *ipso facto* constitutes a violation of Cleveland Construction's procedural due process rights. This argument is unprecedented and insupportable and should be rejected.

CONCLUSION

The Supreme Court of Ohio correctly applied constitutional due process principles to determine that Cleveland Construction has no constitutionally protected property interest in a City contract awarded under the "lowest and best" bid standard. Neither Cleveland Construction nor any other bidder has a legitimate claim of entitlement to a contract awarded under the City's discretionary procurement system. Therefore, this Court should decline jurisdiction in this case.

Respectfully submitted,

John P. Curp
City Solicitor
Mary Frances Clark
Counsel of Record
Richard Ganulin
Assistant City Solicitors
Room 214, City Hall
801 Plum Street
Cincinnati, OH 45202
(513) 352-3328
(513) 352-1515 Fax
mary.clark@cincinnati-oh.gov
Attorneys for Respondent